THE LAW OF PRIVACY.

An article by Messrs. Samuel D. Warren and Louis D. Brandeis on "The Right to Privacy," in the Harvard Law Review of December 1890,[1] enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence. The authors first summarize the growth of legal protection with the broadening of the intellectual and spiritual wants of mankind. A stage has now been reached when not only rights of the physical person, of property and of reputation must be guarded, but also, immunity should be afforded against the use of one's personality for private gain by others, or to feed a prurient curiosity. The writers ingeniously offered as a germinal analogue the law, not of defamation, but of literary property. While they may have gone too far in interpreting incidental *dicta* in cases in England upon the abuses that would flow from the privilege of indiscriminate publication as recognition of a *property* right in thoughts or subjective conceptions, irrespective of their linguistic or pictorial form, the undoubted property right in the definite embodiments of intellectual effort until they are voluntarily published has been adopted as the derivative basis of the right of privacy by practically all the opinions in which it has been upheld. Thus the dissenting opinion of Judge John Clinton Gray in *Roberson* v. *Rochester Folding Box Co.* (New York) approved as to reasoning and result in *Pavesich* v. *New England Life Ins. Co.* (Georgia) assigns as the most available principle

"that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind."[2]

During the twenty-two years since the publication of the article by Messrs. Warren and Brandeis cases involving the right of privacy have been passed upon by several courts, with discordant results. The more important cases are collated below.[3] In addition

[1] 4 Harv. L. Rev. 193.

[2] (1902) 171 N. Y. 538, 564.

[3] Corliss *v.* Walker (1893) 57 Fed. 434, (1894) 64 Fed. 280; Schuyler *v.* Curtis (1895) 147 N. Y. 434, (1892) 64 Hun 594, (1893) 24 N. Y. Supp. 509, (1891) 15 N. Y. Supp. 787; Atkinson *v.* Doherty (1899) 121 Mich. 372; Roberson *v.* Rochester Folding Box Co. (1902) 171 N. Y. 538; Pavesich *v.* New England Life Ins. Co. (1905) 122 Ga. 190; Edison *v.* Edison Mfg. Co. (July 1907) 73 N. J. Eq. 136; Vanderbilt *v.* Mitchell (June 1907) 72 N. J. Eq. 910, 927; Foster-Milburn Co. *v.* Chinn (1909) 134 Ky. 424; Henry *v.* Cherry (1909) 30 R. I. 13; Munden *v.* Harris (1911) 153 Mo. App. 652; Hillman *v.* Star Pub. Co. (1911) 64 Wash. 691; Baker *v.* Libbie (1912) 210 Mass. 599.

there has been a large volume of discussion in legal journals and reviews, and this especially of the decision of the New York Court of Appeals in *Roberson* v. *Rochester Folding Box Co.*, wherein the existence of a right of privacy was denied under such harrowing circumstances as to lead to something of a storm of professional, as well as popular, disapproval. In this discussion quite unprecedently a member of the majority of the court offered a plea of justification which appeared in the present periodical.[1] After nearly a quarter of a century of tentative and conflicting action by the courts it may be of interest to analyze and classify what has been judicially laid down, with some attempt at prognosis of the future development of the law.

Upon the very face of the cases an important distinction appears between those of them that consider privacy pure and simple and those dealing with privacy conjoined with a pecuniary or business interest. Illustrations of the former class are *Schuyler* v. *Curtis* (New York) involving the right to erect a statue of a person because her career was regarded as an ideal of human conduct and *Hillman* v. *Star Publishing Company* (Wash.), in which damages were claimed for the publication in a newspaper of a photograph of a young woman to attract adventitious interest to an article stating that her father was charged with a crime and would be arrested. Most of the cases fall under the second group, of which *Roberson* v. *Rochester Folding Box Company* has been most notorious. It was therein held that an injunction could not be granted to restrain the unauthorized use of lithographic prints of a photograph of a young woman as part of an advertisement for the sale of a manufactured article.

While the decisions in Michigan and Rhode Island take the same view as the majority of the Court of Appeals of New York on this question of invasion of another's privacy for commercial gain, the courts of Georgia, New Jersey, Kentucky and Missouri have held to the contrary. Moreover, as to the New York case, it must not be overlooked that the decision was by only a bare majority; that the dissenting opinion by Judge John Clinton Gray was very able and has been extensively quoted and approved in other states and that the majority of the Court of Appeals reversed a unanimous decision of the Appellate Division. It is therefore proper to say that a preponderance of judicial sentiment, even

[1] "The Right of Privacy", by Hon. Denis O'Brien, 2 COLUMBIA LAW REVIEW 437.

in the State of New York, was adverse to the final actual decision and, further, to say generally that there is a numerical preponderance of courts and a preponderating judicial attitude in favor of the protection of privacy at least as affected with a mercantile interest.

So much feeling was aroused by the *Roberson Decision* that shortly after it was rendered, a statute was passed in New York to cover the specific case of using for advertising or trade purposes the name or portrait of a living person without his consent. This infraction of what the Legislature itself terms a "right of privacy" was made a misdemeanor and the aggrieved individual was granted the right to sue not only for an injunction, but for damages, which may even include "smart money."[5]

The property incident, where one's physiognomy is pirated to tout another person's business is so patent that the law would indeed be impotent if it could not take cognizance. This special feature was recognized in Judge Gray's dissenting opinion and is convincingly presented by the Missouri Court of Appeals in *Munden* v. *Harris* in the following language:

"Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use, any right which he has in order to determine whether it is a valuable right of which he cannot be deprived and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. * * *"

"One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his *own* profit and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"[6]

In this Missouri case it appeared that defendants, who were jewelry merchants, used plaintiff's portrait as a part of their business advertisement. The action was at law for damages and it was held, overruling demurrer to the petition, that not only general

[5]N. Y. Consol. Laws, Civil Rights Law. Art. 5.

[6](1910) 153 Mo. App. 652, 658

damages without showing specific loss, but punitive damages were recoverable; and this without any statutory authority such as now exists in New York. In *Pavesich* v. *New England Life Ins. Co.* in the Supreme Court of Georgia, and *Foster-Milburn Co.* v. *Chinn*, in the Supreme Court of Kentucky, also actions at law and precisely similar on the facts, it was likewise held that recovery might be had without proof of special damage. In *Edison* v. *Edison Mfg. Co.* in the Court of Chancery of New Jersey the form of remedy countenanced was injunction against the use of a person's name by another as part of its corporate title and his picture as a business advertisement. The opinion—fortified by a previous cognate decision of the New Jersey Court of Errors and Appeals in *Vanderbilt* v. *Mitchell*—radically and forcibly upholds the law of privacy, expressly disapproving the New York decision in the *Roberson Case.*[7] Of the two decisions, in addition to the *Roberson Case* in New York, refusing relief in business advertis-

[7]Since the above was written the case of Vassar College *v.* Loose-Wiles Biscuit Co., in the United States District Court, has been reported, (Mo. W. D. 1912) 197 Fed. 982. Defendant, a Missouri corporation, manufactured and sold a variety of candy called "Vassar Chocolates" which it advertised widely, employing the name "Vassar," together with a likeness of a young lady in scholastic garb and wearing a mortar-board hat, also using an imitation of the college pennant and the college seal, with the words "Vassar Chocolates" and "Always Fresh" substituted for the words "Vassar College" and "Purity and Wisdom." The suit being in equity it was held that no ground for relief was shown and that the application for injunction must be denied. Toward the close of a very elaborate opinion it is intimated that the injurious effects complained of are merely fanciful and that the suit was inspired by super-sensitiveness. The expediency of going to law over this particular matter may be open to doubt, but the decision which seems to proceed on the ground that no cause of action could exist in any such case is to be regretted. The opinion adds nothing to the arguments that have been adduced in former cases but consists of the familiar contention against rights of privacy in general. While it may be conceded that a corporation cannot have a right of absolute privacy such as that of a natural person it is difficult to perceive why a property right in its corporate name and insignia should not be recognized. The exposition of intangible property rights in the opinions in Munden *v.* Harris and Vanderbilt *v.* Mitchell would legitimately apply to corporations. If a competitor in the same line of business used a corporation's name in the nature of a trade mark, an injunction would undoubtedly lie on ordinary grounds of unfair competition. And even where there is no direct and specific competition it seems only fair that a business corporation of any sort should be permitted to control the use of its own name and attributes. As to educational and religious corporations the reason for such right of control may be very substantial. If the seal of a college were being so cheapened by commercial use as to make it probable that prestige and patronage were being diminished, equity ought to protect its "property right." If the motto or the pictorial insignia of a religious corporation were being ribaldly perverted as a trade mark for a chain of drinking saloons, equity indeed should interpose, although the "property right" is entirely unsusceptible of pecuniary valuation.

ing cases, *Atkinson* v. *Doherty*, in the Supreme Court of Michigan, and *Henry* v. *Cherry*, in the Supreme Court of Rhode Island, the former was, like the *Roberson Case*, in a suit in equity for an injunction and the latter in an action at law for damages.

Apparently, only three cases involving absolute privacy have been reported: *Corliss* v. *Walker* in the U. S. Circuit Court for Massachusetts; *Schuyler* v. *Curtis* in the Court of Appeals of New York, both of them equity suits for injunction, and *Hillman* v. *Star Publishing Co.* in the Supreme Court of Washington, a suit at law for damages. The actual result in all these cases was refusal to effectuate an alleged right of privacy. In addition to them, however, the opinions in the cases involving infringement of privacy for business purposes fully discuss the nature and limitations of absolute privacy and some of them give convincing reasons for its legal protection. The consideration of inherent rights of privacy by the Supreme Court of Georgia in *Pavesich* v. *New England Life Ins. Co.* and in the dissenting opinion of Judge Gray in *Roberson* v. *Rochester Folding Box Co.* are especially instructive and valuable.

The *Corliss Case* was brought by the widow and children of Mr. Corliss, who was famous in the world of manufacturing, and especially so as the builder of the great engine exhibited at the Centennial Exposition held at Philadelphia in 1876, to restrain the publication of a biography accompanied by his picture. The two opinions filed are tentative and somewhat faltering in their reasoning. In the first decision[8] it was, after considerable balancing of views, laid down that the constitutional freedom of speech and the press necessitated denial of the injunction against publication of the biography, while holding that the publication of the picture must be restrained because the copy of the portrait or photograph from which it had been made had been obtained on conditions which the defendants had not complied with and the use thereof would therefore amount to a violation of confidence. In the subsequent decision[9] the court remarked, evidently under the influence of the Harvard Law Review article:

"* * * Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the

[8] (1893) 57 Fed. 434.

[9] (1894) 64 Fed. 280.

same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk * * *."[10]

The former injunction was, however, dissolved after fuller consideration, upon the ground that the defendants had

"obtained a photograph of Mr. Corliss at a public shop in Providence. Whatever contract may have existed between the photographer and Mr. Corliss, they were not a party to it, and they had the same right to reprint copies from this photograph that they would have had from that of any other public man. Further, it does not seem that Mr. Corliss, personally, ever objected to the reproduction of his picture, but, on the contrary, that he permitted thousands of his pictures to be circulated. * * *"

The final result was that, Mr. Corliss being a public character, the publication of his biography could not be enjoined, nor, under the circumstances ultimately disclosed, the publication of his portrait to accompany it.

The distinction between public and private characters had been considered in the opinions of inferior New York courts in *Schuyler* v. *Curtis* and the discussion doubtless had weight in the deliberations of Judge Colt in the *Corliss Case*. In our view the Federal judge was correct in holding that Mr. Corliss was a sufficiently public personage for commemoration and the lower New York courts were wrong in taking the contrary position as to Mrs. Schuyler.

The personal status of publicity or privacy has led to very serious controversy in the cases, as well as among text-writers. Although not approving of the decision of the majority of the New York Court of Appeals in *Roberson* v. *Rochester Folding Box Co.*, we do subscribe to the *dictum* of Chief Judge Parker in the prevailing opinion that a "distinction between public and private characters cannot possibly be drawn,"[11] in the sense that an abstract, comprehensive classification of public and private characters, or public and private capacities, is out of the question. It has been contended by some courts that a person in becoming a public character in some field surrenders all rights of inviolate personality. This view is unnecessary and entirely unjust. As was very properly said by Presiding Justice Van Brunt in *Schuyler* v. *Curtis:*

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[10] *Ibid.* 282.

[11] (1902) 171 N. Y. 538, 554.

"The claim that a person who voluntarily places himself before the public, either by accepting public office or by becoming a candidate for office or as an artist or literary man, thereby surrenders his personality, while living and his memory when dead, to the public to be used or abused, as any one of that irresponsible body may see fit, cannot for a moment be entertained. It is undoubtedly true that by occupying a public position or by making an appeal to the public a person surrenders such part of his personality or privacy as pertains to and affects the position which he fills or seeks to occupy; but no further. * * *"[12]

It would be deplorable if an eminent statesman could not restrain the use of his portrait as the trade-mark of a disgusting quack nostrum. On the other hand, a person of ordinary ability and life may by a single act of heroism become an appropriate subject for public notice. His single achievement may, indeed, have been so unusual and significant as to gain for him a place in history. *Pro tanto,* therefore he becomes a public character both for the day and the future. So also, by acts of charity or by a career of philanthropy, the life of an individual who systemically strove never to let his right hand know what his left hand did, might become a valuable ideal to mankind. And this was precisely the situation disclosed in *Schuyler* v. *Curtis.*

In 1893 an association of ladies inaugurated a project to exhibit at the Columbian Exposition at Chicago a bust of the late Mrs. Mary Hamilton Morris Schuyler, selecting her as a type of "woman as the philanthropist." Legal steps were taken on behalf of her nieces and nephews, the nearest surviving relatives, to enjoin the proposed commemoration. The litigation succeeded in the lower courts, so as actually to prevent the exhibition of the statue at the World's Fair, on the ground that because Mrs. Schuyler had never engaged in certain forms of public activity, such as authorship, or the display of artistic productions, she was a private and not a public character. The Court of Appeals, however, later reversed this action, more especially on the ground that whatever right of privacy may have existed died with the person. The law of the subject is still in a fluid condition and we shall have occasion later to criticize and disapprove this specific ruling of the New York court of last resort.

The opinion is, however, a notable contribution to the literature of the subject. For example, Judge Peckham remarks:

[12](N. Y. 1892) 64 Hun 594, 595.

"While not assuming to decide what this right of privacy is in all cases, we are quite clear that such right would not be violated by the proposed action of the defendants. The plaintiff's cause of action is, we think, wholly fanciful. The defendants' contemplated action is not such as might be regarded by reasonable and healthy minds as in the slightest degree distressing or tending in the least to any injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts."[13]

The view contended for by the plaintiff would have forbidden commemoration of the late George Peabody, the late Peter Cooper and of many others who were sincerely regarded as models for posterity. The suit was in no sense an assertion of a lady's modesty but rather of the super-sensibility of her kinsman. The decision can scarcely be regarded as authority on any point because the later decision in *Roberson* v. *Rochester Folding Box Co.*, repudiating any such thing as a legal right of privacy, superseded and discredited any concessions in favor of the right that it made. The reasoning of Judge Peckham, is, nevertheless, helpful in determining the rational limits of privacy.

In *Hillman* v. *Star Publishing Co.*, in the Supreme Court of Washington, a young woman had sued for damages for the wanton publication of her picture in connection with a charge of her father's dereliction and it was held that for what was conceded to be a gross piece of "yellow iniquity," no action would lie and the whole law of privacy was repudiated. This decision has been adversely criticised editorially by the American Law Review for July-August 1912,[14] and by the Michigan Law Review for February 1912.[15] The learned editor of the American Law Review condemns the Washington court strongly but none too severely for its unnecessary stultification of the maxim that "there is no wrong without a remedy." He further shows that the Washington decision is founded upon the *Roberson Decision* in New York, uses strenuous terms in derogation of the latter and cites to the contrary the Missouri decision in *Munden* v. *Harris*. Both the New York and the Missouri cases, however, concern privacy affected with a commercial interest. While the general arguments for or against the law of privacy apply to both classes of cases,

[13](1895) 147 N. Y. 434, 451.

[14]46 Amer. L. Rev. 587.

[15]10 Mich. L. Rev. 335.

it is well to keep the distinction between them constantly in mind. It is emphasized when we come to consider such meagre, short sighted, independent discussion as the opinion of the Washington court contains. The Court remarks:

"This case presents a subject for legislation, and to the legislative body an appeal might be so framed that in the future the names of the innocent and unoffending, as well as their likenesses, shall not be linked with those whose relations to the public have made them and their reputations, in a sense, the common property of men."[16]

We have already seen that it would be impossible to draw an abstract definitive line between public and private characters; a statute which made such an attempt would be an abortive and futile piece of legislation. It is comparatively easy, if a court declines to act on its own initiative, to frame an act to cover cases of invasion of privacy for another's business purposes, as was done in New York, but it is precisely in cases of absolute privacy that no statutory remedy is feasible. The only form of statute that could be of utility would be one absolutely prohibiting the publication of a living person's picture without his consent. Although in the great majority of instances of proper publication the consent would be readily procurable, the objection is that such a law would prevent the symbolical or figurative use of persons' portraits for political caricature or to point social morals. This feature has been for many years all over the world one of the most potent of journalistic weapons and popular sentiment would probably deem the continuance of its legitimate use more important than the suppression of individual hardships of publicity. For the abuse of personal caricature a remedy now exists under the law of Defamation and a similar remedy should be extended for the abuse of publication of portraits without humorous or didactic suggestion, under the law of Privacy.

This would in no wise curtail the proper freedom of the press. The physiognomy of a candidate for office is an important object for public scrutiny as it betokens character and it would not be unjustifiable to publish his picture. It is also right to publish an account of an act of heroism by a formerly obscure person or even of his calamity in a street accident. Pictorial illustration of such a "story" is not necessarily objectionable. If in connection with a newspaper account of a public ball, or similar social function, to

[16](1911) 64 Wash. 691, 695.

which according to custom reporters were admitted, the picture of a young woman in the costume she wore were given, the benefit of any doubt should be resolved in favor of journalistic liberty.

The test to be administered in any case is, whether under all the circumstances appearing the publication of a person's picture was legitimate because of his connection either with some form of public life or with some event of public importance or interest. As to a candidate for public office the court should hold as matter of law that for publication of his portrait a suit would not lie. In Miss Hillman's case the jury should have been instructed as matter of law that the publication was actionable. She was not a public character, or connected with an event of public significance merely because she was her father's daughter. In doubtful cases the question whether one is public or publicly involved may itself be submitted to the jury, along with the assessment of damages, to range all the way from nominal to punitive damages. It is a truism of the authorities that difficulty of practical administration in certain cases is not a valid objection to the recognition of a legal principle. Actually, the privacy test above stated would be little, if any, more abstract or speculative than is the criterion of negligence which is constantly applied to concrete facts by juries.

Nor would recognition of actionability at law lead to a flood of speculative and unconscionable litigation. The American people are indulgent even toward positive libel, therein differing widely from the English people. It is probable that no edition of a great American daily newspaper is ever issued that does not contain several pieces of suable defamation, but for only a very small proportion of them are suits brought. With regard to mere publicity the attitude is even more liberal. The average person likes to see his picture in a newspaper upon any pretext. Even if occasionally actions were commenced by persons supersensitive to publicity the ordinary American jury would be unable to perceive any damage. It is not conceivable that litigations over infractions of mere privacy would grow into anything like the abuse that "trumpery libel suits" are in England. It would be a safeguard, however, to have a right of action for damages for invasion of privacy so established as to be available in meritorious cases, just as it is always a deterrent against excesses that actionability for defamation exists, although resorted to with comparative infrequency.

It is doubtless true that the principal brunt will rest upon courts of equity. In his dissenting opinion in the *Roberson Case,* Judge

Gray, pointing out that the peculiar preventive power of a court of equity is a proper remedy for effectuating rights of privacy, quotes a *dictum* of Sir Henry Maine, that equity is an agency "by which law is brought into harmony with society."[17] A court of equity is the more appropriate tribunal to pass upon questions of essential privacy, that is to say, the discrimination between public and private capacities, between ordinary communications and confidential correspondence. Moreover, equity is capable of granting substantially complete relief in the average case through its authority to award past damages as incidental to an injunction. The larger number of actions involving continuing as well as merely threatened publication will naturally be brought on the Chancery side of the court.

No equitable remedy would exist, however, for a single publication of which no previous warning was obtained, and a right to sue at law is therefore indispensable. In *Munden* v. *Harris*, involving invasion of privacy for business purposes, the Missouri court approved of the award of punitive damages and the form of the New York statute betokens a popular sentiment in favor of allowing "smart money" in such cases. In our judgment punitive damages might even more properly have been recoverable in *Hillman* v. *Star Pub. Co.*

Nevertheless, as a concession to difference of opinion, it may be suggested that courts that believe it would be inexpedient to countenance exemplary damages should at least grant relief to the extent the New York Court of Appeals did in *Gillespie* v. *Brooklyn Heights R. R. Co.*[18] There a cause of action against a street railroad company was recognized to recover compensatory, but not punitive, damages for abusive language addressed to a passenger by a conductor. Three members of the court dissent and the decision itself is placed upon the somewhat artificial theory of an implication of the contract of carriage. The real reason for the decision was doubtless a sense of duty to provide a remedy for a serious and not infrequent wrong, which judicial responsibility the Washington court ignored. Visiting a substantial but not aggravated liability upon a railroad company for misconduct of its employees, although falling short of actual assault or injury to character, tends to protect the public against the engaging of men of notoriously violent or evil tongues. Practically, therefore, the

[17](1902) 171 N. Y. 538, 562.

[18](1904) 178 N. Y. 347.

Gillespie Decision is commendable and to a similar extent certainly all courts should go by allowing at least compensatory damages for the mental suffering inflicted by such an outrage as the publication of Miss Hillman's picture in the Washington newspaper. Otherwise, as the learned commentator in the Michigan Law Journal suggests, "the demands of yellow journalism" would, indeed, be "the final test of legitimate legal publicity."[19]

This, we repeat, is merely in the nature of possibly necessary compromise. The actual responsibility of the editor and manager of a newspaper for the publication of a person's picture is very different from that of the officers of a railroad for the language of an ignorant conductor or brakeman in a fit of anger and much more clearly would justify the award of punitive damages.

An important utterance upon the law of privacy is contained in the opinion of the Supreme Judicial Court of Massachusetts in *Baker* v. *Libbie*.[20] It was sought by the executor of the late Mary Baker G. Eddy, the founder of "Christian Science," to restrain an auctioneer of manuscripts from publishing for advertising purposes, and from selling, autograph letters sent by her to a cousin and treating of domestic affairs. Well settled rules of literary property were administered. If a person write a letter to a friend the former owns the verbal text he has composed; he may publish it and may restrain the recipient from its publication. The recipient, on the other hand, becomes the owner of the physical medium, that is, the paper with the writing on it.

The opinion was by Chief Justice Rugg, who, in a service of little more than one year in the Supreme Judicial Court has made a distinctive and enviable mark as a jurist. It is held, that while publication or multiplication of copies by the assignee of the letters may be restrained, he may sell the letters themselves, like ordinary articles of property. Before reaching this conclusion the Chief Justice refers to the famous Harvard Law Review article and uses this pregnant language:

"* * * the very nature of the correspondence may be such as to set the seal of secrecy upon its contents. See *Kenrick* v. *Danube Collieries & Minerals Co.*, 39 W. R. 473. Letters of extreme affection and other fiduciary communications may come within this class. There may be also a confidential relation existing between the parties out of which would arise an implied prohibition against any use of the letters, and a breach of such trust

[19] 10 Mich. L. Rev. 335, 336.

[20] (1912) 210 Mass. 599.

might be restrained in equity. * * * This case does not involve personal feelings or what has been termed the right to privacy. 4 Harvard Law Review, 193. The author has deceased. Moreover, there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings. * * *"[21]

These remarks cannot be regarded as *obiter* and therefore negligible as authority. They are part of the essential reasoning; the marketability of the letters is made to depend upon the "absence of some special limitation imposed either by the subject-matter of the letter or the circumstances under which it is sent." Contained in the unanimous opinion of one of the leading and most influential state tribunals the significance of this language is very great. It would countenance legal protection for what is perhaps the most sacred and widely applicable feature of privacy. Under the policy so laid down courts would take into consideration not only the circumstances and personalities of the parties to a bill in equity, but the nature of what it was proposed to make public, and, if it were of inherently confidential character, grant an injunction, notwithstanding the legal title to an autograph letter or other form of manuscript.

The question left in greatest doubt by all the decisions is that of *post mortem* privacy. As already shown, the New York Court of Appeals in *Schuyler* v. *Curtis* disposed of the matter on the specific ground that whatever right of privacy Mrs. Schuyler had did not survive her. The circumstance that she was dead was one of the elements for equitable consideration and the point advanced was a convenient one for the immediate determination. The ordinary dangers of *obiter dicta* attach in entering upon new and untried fields even to the reasons assigned for decisions. It is difficult to realize what bearing they may have in future cases of different circumstances.

In *Baker* v. *Libbie*, also, the fact that the writer of the letters was dead was stated by the court as one of the factors in determining that no right would be infringed. Whether a person be alive or dead will usually be a material, sometimes a controlling, circumstance in the Chancellor's mind. The law of the subject is still in a formative state and no case, so far as the present writer is aware, has arisen in which justice or decency required that privacy should be protected after a person's death. It does not, therefore, at all follow from the decisions already had, or from

[21] *Ibid.* 606.

dicta contained in them, that a court of equity would not rise to the situation if a very meritorious case were presented. In the opinion of Judge Van Brunt in *Schuyler* v. *Curtis*, in the General Term, from which we have already quoted, it is remarked:

"The result of this claim is that when a person is dead there is no power in any court to protect his memory, no matter how outrageously it may be insulted. The feelings of relatives and friends may be outraged, and the memory of the deceased degraded with impunity by any person who may desire thus to affect the living. It seems to us that such a proposition carries its own refutation with its statement. It cannot be that by death all protection to the reputation of the dead and the feelings of the living, in connection with the dead, has absolutely been lost. The memory of the deceased belongs to the surviving relatives and friends, and such relatives have a right to see that that which would not have been permitted in respect to the deceased when living shall not be done with impunity when the subject has become incapable of protecting himself. * * *"[22]

In all of the decisions of the lower courts in that case it was taken for granted that a remedy must be found because there was a crying wrong. The Court of Appeals, on the other hand, as we think properly, said that there was no wrong and it would in any event therefore have followed that no remedy should be decreed.

It is probable that the attitude of the average court of equity, if a case of proposed outrage to the memory of the dead came before it, would be that of the inferior New York courts in the *Schuyler Case*, a remedy at the suit of some person being granted, although no exact former precedents existed. As Messrs. Warren and Brandeis found a helpful analogy in the law of literary property for the general substantive law of privacy, it may be suggested that approximate analogies are not wanting for the suppression of *post mortem* aspersion. It has long been the custom of courts to entertain suits by mere "next friends," who have no personal interest in the controversy, in behalf of persons *non sui juris*. It would not be straining but merely developing this form of practice to permit an action for an injunction by the wife, husband, children or relatives of one who is dead.

The courts countenance suits for damages in behalf of a surviving wife, or husband, for unauthorized dissection, or other form of indignity, to the remains of the dead.[23] No doubt an injunction

[22](1892) 64 Hun 594, 596.

[23]Foley *v.* Phelps (N. Y. 1896) 1 App. Div. 551; Larson *v.* Chase (1891) 47 Minn. 307.

would be granted in such a case if notice of the intention to perform an autopsy were given. The existence of this basis of actionability would be of aid in recognizing the right of a relative to shield the memory of the departed from moral indignity.[24] The policy of a court of equity in the face of such a question should be similar to that indicated by Mr. Justice Peckham in *United States* v. *Gettysburg Electric Ry.*,[25] wherein was upheld the authority of the federal government to exercise eminent domain in acquiring land for the purpose of preserving and commemorating as an historical shrine the battlefield of Gettysburg. The learned Justice said:

"No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference, from them all may be drawn that the power claimed has been conferred."[26]

In conclusion it may be intimated that the prognosis for general

[24]Since this article went to press the Court of Appeals of Kentucky has rendered a decision which bears out the suggestion made in the text. In Douglas *v.* Stokes (1912) 149 S. W. 849 it appeared that one of the plaintiffs gave birth to twin boy children, joined together from the shoulders down to the end of their bodies, and having certain organs in common. They died, and after death plaintiffs employed defendant, a photographer, to take a photograph of the corpse in its nude condition, it being agreed that defendant was to make for plaintiffs twelve photographs, and no more. Contrary to the agreement, defendant made several photographs from the negative, one of which he filed in the copyright office of the United States, and a copyright was issued to him thereon. It was held that defendant's misuse of the negative by copyrighting it constituted a violation of the right of privacy of the bodies, for which he was liable for damages in a suit brought by both parents. The court said in part: "The corpse of the children was in the custody of the parents. The photographer had no authority to make the photographs, except by their authority, and when he exceeded his authority he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of a living person, and this has been held actionable. (Citing Foster-Milburn *v.* Chinn *supra,* and other authorities.) The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation. (Citing cases.)

If the defendant had wrongfully taken possession of the nude body of the plaintiffs' dead children and exposed it to public view in an effort to make money out of it it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that supposed in degree, but not in kind."

[25](1896) 160 U. S. 668.

[26]*Ibid.* 683.

establishment and development of the law of privacy is favorable. The present situation has had many parallels in the history of jurisprudence; is indeed quite typical. Through advances in science or art or through social growth, courts are constrained, with insufficient, or with no, statutory aid, to create a new field of law. The first court in which the novel questions arise does its best by dint of what are deemed the most available analogies. The outlook of the next court will probably be broader because of additional facts in the record and in any event it will have the benefit of the first court's arguments. If the first two courts disagree the third court starts with the opposing reasoning of trained minds that were striving not to win a case but to be absolutely judicial. Because of the large number of American courts of appeal tribunals taking up a subject at a later stage have, in addition to the aid of advocacy at the bar, the inestimable aid of a sublimated form of advocacy from the bench. Gradually the broader and sounder theoretical views, the more comprehensive public expediency are disclosed through judicial concurrence or clash. This process has been repeated again and again in the growth of American jurisprudence and it is now in operation as to the law of privacy. The attitude of the Supreme Judicial Court of Massachusetts in *Baker* v. *Libbie,* decided the present year—albeit the law of privacy is dealt with not directly but only subsidiarily—is deemed significant of the general future trend.

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